IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON CO.

Appellant

v.

BEN E. PITTMAN

Appellee

On Appeal from the Supreme Court of the State of Mississippi

MOTION TO STRIKE

Pursuant to Rule 40(5),[1] Appellee moves the Court to strike all or certain portions of the brief filed by the American Cotton Shippers Association as *amicus curiae*.

BRIEF IN SUPPORT

I. STATEMENT

Aside from the question of jurisdiction[2] this case involves one substantive consideration: Whether the Allenberg Cotton Company was engaged in interstate commerce and therefore exempt from qualifying as a foreign corporation in the state of Missis-

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[1]"Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, and scandalous matter. Briefs not complying with this paragraph may be disregarded or striken by the court."

[2][F]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." 42 L.W. 3541 (March 26, 1974).

sippi.[3] Previous decisions[4] defining interstate commerce for purposes of exempting foreign corporations from no-access (to state court) statutes upon failure to register have *not once* spoken to the *motives* of parties availing themselves of the defense offered by such statutes as constitutionally significant. In addition, the record in the present case is *devoid* of evidence taken with respect to the reason Ben Pittman failed to deliver his crop to the Allenberg Cotton Company.

In consenting to participation by the American Cotton Shippers Association as a friend of the Court, counsel for Pittman expected a presentation limited to a discussion of fact and law specifically related to the question now pending. This motion contends that the brief filed contains irrelevant and scandalous matter with respect to Appellee and his counsel.

II. THE CHARGES

Ben Pittman has been acting pursuant to advice of counsel throughout this litigation. In addition to allegations of current attempts to enlist this Court's support in an "ignoble"[5] (motivated or characterized by baseness; low birth; of animals)[6] and "nefarious"[7] (heinously or impiously wicked; vicious)[8] scheme,[9] *amicus* points to false pretense and deceit (dissimulation)[10] and a *willingness to prostitute talents and/or be influenced improperly by bribery or corrupt measures* ("venality").[11] A second set of charges, which in and of themselves would be enough to evoke a defensive response by any member of this Bar, are weak in comparison, *i.e.*, "self aggrandizement,"[12] lack of

[3]And therefore not subject to statutory penalties. As posed by Appellant: "Can the Mississippi courts absolutely ignore controlling constitutional precedent, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921), and bar a foreign corporation from enforcing contracts for the purchase of raw agricultural products in Mississippi?" *Jurisdictional Statement* 3.

[4]E.G., *Eli Lilly & Co., Inc. v. Sav-on-Drugs*, 366 U.S. 276; *Union Brokerage Co. v. Jensen*, 322 U.S. 202; *Sioux Remedy Co. v. Cope*, 235 U.S. 197; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282.

[5]Brief, *American Cotton Shippers Association* 40. (hereinafter referred to as Brief.)

[6]WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 1125 (1971) (hereinafter referred to as WEBSTER.) OXFORD UNIVERSAL DICTIONARY 954 (1955).

[7]Brief at 99.

[8]WEBSTER at 1513.

[9]*Amicus* fails to set forth what or who is specifically involved. Participants could include the Mississippi Supreme Court, the state's legislature, and obviously Ben Pittman and counsel. Strictly construed they relate to Pittman and counsel.

[10]Brief at 40. WEBSTER at 657.

[11]Brief at 51. WEBSTER at 2539.

[12]Brief at 51.

"noble purpose",[13] and "insensitivity."[14] Falling into a separate line of attack are allegations by *amicus* apparently questioning both the right of Ben Pittman to defend himself in this Court and the propriety of his counsel asserting rights acquired by him under the Mississippi statute involved:

> Rather, [Ben Pittman] who intentionally seeks to trammel on the trust and fair-dealing (A-64) of Appellant, unabashedly requests this Court to ignore a four square precedent....Defendant, *who appears in this Court with the unclean hands of a contract breacher*, has the *effrontery* ["insolent to crass discourtesy"][15] ***straight-facedly*** to urge this Court to uphold his claim . . . . [16]

III. CASE PRECEDENT

The law with respect to including scandalous material in presentations before this Court is clear. In *Supreme Court of the Royal Arcanum v. Green*, 237 U.S. 531, 546 (1915):

> Before making the order of reversal, we regret that we must say something more. The printed argument for the defendant in error is so full of *vituperative, unwarranted, and impertinent expression as to opposing counsel* that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain in our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once....[T]he brief of the defendant in error is ordered to be striken. [Emphasis added.][17]

The posture of this Court with respect to duty of counsel is perceived by Stern and Gressman in the following warning:

> *Avoid personalities or scandalous matter.* It should be superfluous to add that any scandalous matter, *any personal attack on opposing counsel* or lower court judge, *or any imputation of improper conduct by counsel* or court has no place whatever in the brief....*When such matter*

[13]*Ibid.*

[14]*Id.* at 40.

[15]WEBSTER at 728.

[16]Brief at 40. (Emphasis added.) These are but primary examples. See also Brief at 10-12, 99.

[17]See also, *Wilkes County v. Coler*, 186 U.S. 480; *Yellow Poplar Lumber Co. v. Chapman*, 215 U.S. 601 (petitions and briefs striken); *Washington Post Co. v. Chaloner*, 250 U.S. 290 (brief striken); *Green v. Elbert*, 127 U.S. 615 (brief striken). Other cases are gathered in R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, § 1311 (1959).

appears a motion to strike all or a portion of the offensive brief becomes appropriate. [R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 477 (1969). (Emphasis added.)]

IV. CONCLUSION

On the basis of precedent and the plain language of Rule 40(5), it is respectfully submitted that this Court cannot and should not tolerate a brief remaining in its files containing such baseless allegations relating to character, professional responsibility, and motives as characterized by *amicus*. The decision by the trade organization to proceed in this manner places Ben Pittman, his attorneys and this Court in the position of beneficiaries of emotionally charged, speculative, and unjustifiable assertions. None find solace from the record; none relate to constitutional criteria heretofore utilized to decide the question at hand. They must be striken.

This motion comes prior to this Court's summer recess. The case is scheduled for oral argument in the fall. Quite obviously *amicus* has compiled a great quantity of work for review by the Court and possesses an obvious interest. If the brief is judged to contain material capable of assisting in the decision-making process, Appellee consents to a refiling.

Respectfully submitted,

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